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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 566 Misc.

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment discharging the writ of habeas corpus and remanding the petitioner to the custody of the Warden in an opinion reported as *Chessman v. Teets,* 239 Fed.2d 205. The opinion of the United States District Court is reported as *Chessman v. Teets,* 138 Fed.Supp. 761 (1956).

JURISDICTION.

The jurisdiction of this Court is apparently invoked under 28 U.S.C. § 1253. The order of the United States Court of Appeals denying a rehearing was entered on November 30, 1956.

QUESTIONS PRESENTED.

Did the District Court err in ruling on motions, the admissibility of evidence, or procedural questions at the hearing?

Did the District Court properly exercise its discretion in considering only the question of fraud and corruption in the preparation of the transcript used on appeal in the State courts?

STATEMENT OF THE CASE.

History of This Litigation.

On December 30, 1954, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. (CT 1.) Judge Goodman denied the writ on January 4, 1955. (CT 24.) Thereafter the matter was appealed to the United States Court of Appeals which rendered an opinion reported in *Chessman v. Teets,* 221 U.S. 276. Thereafter a writ of certiorari was sought and the United States Supreme Court ordered a hearing on the question of fraud and collusion in the settlement of the record. See 350 U.S. 3. (CT 53.)

On November 30, 1955, petitioner's counsel secured the issuance of a writ of habeas corpus returnable December 8, 1955. (CT 55.) A return to the writ was filed on December 8, 1955. (CT 56.) The matter was set for hearing on January 9, 1956. (CT 58.) At the same time the custody of petitioner was transferred to the marshal. Petitioner remained in the state prison and an order was made providing for consultation between petitioner and his counsel. (CT 59.) This order was thereafter amended on December 21, 1955. (CT 100.) Thereafter the trial of the matter was continued on January 10, 1956 and thereafter to January 16, 1956 (CT 122). The matter proceeded to trial on January 16, 1956, and the trial continued through January 24, 1956. On January 31, 1956, Judge Goodman filed an opinion, findings of fact and judgment ordering the writ discharged and petitioner remanded to the custody of respondent (CT 204-215.) The matter was thereafter appealed to the United States Court of Appeals for the Ninth Circuit and its opinion is reported as *Chessman v. Teets*, 239 Fed. 2d 205.

Pages one through six of the clerk's transcript contain excerpts from the docket entries in the *Chessman* case from the period of December 30, 1954 to March 12, 1956.

Statement of the Facts.

Since petitioner did not attack the sufficiency of any of the findings of fact in the United States Court of Appeals, no detailed summary of the evidence produced at the trial will be made.

In 1948 petitioner was convicted of seventeen felonies. Two of the judgments imposed the death penalty. These convictions were affirmed on appeal by the California Supreme Court (*People v. Chessman*, 38 Cal.2d 166, cert. den. 343 U.S. 934, rehearing den. 343 U.S. 937). The court reporter, Mr. Perry, died without having completed his transcript. A substitute court reporter, Mr. Fraser, was employed to complete the transcript.

The substance of the allegations of the petition, which was made the traverse, was that the substitute court reporter, Mr. Fraser, the prosecutor, Mr. J. Miller Leavy, and the trial judge, Judge Fricke, conspired and colluded in the preparation of a fraudulent transcript for the California Supreme Court. Petitioner also alleged that Fraser was incompetent, and an instrument of the prosecutor, and that the notes were undecipherable. Petitioner specifically alleged that on May 21, 1948, the transcription omitted an instruction of the judge which required the jury to bring in a death penalty and that the transcript also omitted a remark of the judge to the effect that the petitioner was the "worst criminal" that had ever been in his court.

The substitute court reporter, Mr. Fraser, the prosecutor, Mr. Leavy, and Judge Fricke, were all produced and examined by petitioner's counsel at the hearing. Likewise, Mr. Luskin, assistant county clerk in charge of the criminal records, who was at the time of the trial Judge Fricke's clerk, testified. Also, Mr. DeNoia, deputy clerk of the California Supreme

Court and Mr. Jones, clerk of the Superior Court of Marin County, testified pertaining to records in their respective courts. Petitioner himself likewise took the stand.

The People produced a Pittman shorthand expert and two of the jurors as their witnesses.

As a result of the testimony of these witnesses the court expressly found that the prosecutor did not engage in any fraud or unlawful conduct in preparing the transcript on appeal in petitioner's case; that the prosecutor did not knowingly or otherwise make any misrepresentations to the trial judge for the purpose of inducing the trial judge to certify, allow or approve the transcript; that the prosecutor made no misrepresentations of any kind to the trial judge as to the accuracy or correctness of the transcript, and further, that it was not true that the transcript prepared by Fraser had been materially or otherwise altered through the connivance of Fraser or Leavy, nor was there any corrupt arrangement between them to prepare a fraudulent transcript.

The court found that the shorthand reporter, Perry, was fully competent and physically able at all times to record the proceedings of the trial in the state court.

Likewise, the court found that it was not true that the substitute reporter, Fraser, was a discredited reporter for the State of Washington; that it was not true that Fraser had been discharged at any time for incompetency, drunkenness or for any other cause; that it was not true that Fraser was inebriated or

under the influence of alcohol or mentally incapable of such work at any of the times he engaged in transcribing the notes.

The trial court further found that Fraser was especially and exceptionally competent to transcribe Perry's notes and did so with fairness and competence.

The instructions given by the trial judge to the jury on May 21 were accurately and correctly reported in the transcript as prepared by Fraser. The district court expressly found that the trial judge did not state to the jury that "the defendant is one of the worst criminals I have ever had in my court". (CT 211-213.)

PREFACE TO THE ARGUMENT.

The petition for writ of certiorari filed in the instant case is one of the most scurrilous and misleading petitions or briefs ever to come to the attention of respondent. If the document were merely a brief, a motion to strike would be in order. The filing of such a petition is unjust to the many diligent defense counsel who vigorously, but fairly, present cases to appellate courts. Many counsel, on both sides of a case, occasionally overstate a proposition or simply make a mistake concerning some matter of record or some matter of law. The present petition for certiorari, however, is filled with misleading statements, misstatements of the record and intemperate abuse of

Federal judges and persons connected with the petitioner's prosecution.

This brief shall only seek to correct a few of the most glaring of these misstatements. Respondent shall not seek to point out each of the numerous misstatements. To do so would be to lose sight of the function of an opposition to a petition for writ of certiorari, which function is to assist the court in determining whether any important or major problems exist which this Court should determine.

ARGUMENT.

I.

THE DISTRICT COURT GRANTED PETITIONER A FULL AND FAIR HEARING AND ALL RULINGS OF THE DISTRICT COURT WERE REVIEWED BY THE COURT OF APPEALS AND CORRECTLY DETERMINED BY THAT COURT; NO IMPORTANT QUESTION CONCERNING THE CONDUCT OF THE TRIAL BELOW IS PRESENTED FOR THIS COURT'S DETERMINATION.

The United States District Court granted petitioner a full and fair hearing, which hearing lasted for a period of seven trial days. The District Court made findings of fact and entered a judgment discharging the writ. The United States Court of Appeals fully reviewed all of the District Court's rulings on motions, admissibility of evidence, and procedural matters.

Likewise, many of the questions raised by the petition for certiorari where not raised in the United States Court of Appeals; for example: An examination of the briefs filed by appellant in the United

States Court of Appeals will reveal that petitioner made no attack on the sufficiency of any of the findings of fact made by the District Judge, and yet petitioner devotes several pages to this particular subject in his petition for writ of certiorari.

The decision of the United States Supreme Court in *Chessman v. California,* 350 U.S. 3, ordered a hearing on the question of fraud and corruption in the preparation of the transcript for the California Supreme Court. The trial court has held hearings and made findings on these issues. Petitioner did not object, in the United States Court of Appeals, to the propriety of the findings that there was no fraud or collusion by the prosecutor, substitute reporter or the court, or to the finding that the court reporter transcribed the deceased reporter's notes with fairness and competence. It is hoped that the allegation of fraud, corruption and inaccuracy are laid at rest once and for all, even though petitioner insists upon making these allegations in his present petition.

Petitioner has enumerated many objections to the proceedings in the District Court. Some are completely unjustified and based on a distortion of the proceedings below.

The numerous objections to the proceedings in the District Court have been already discussed in the opinion of the United States Court of Appeals and little can be added except to correct some of the misleading statements made by petitioner.

Petitioner complains that the District Judge precluded him from challenging the accuracy of the tran-

script at the trial. Petitioner at page 38 of his petition boldly asserts that he made a detailed offer of proof on this subject. Such statement of the record is not supported by any references to the transcript, and cannot be supported by any references in the transcript. Petitioner has not made one reference to the exclusion of evidence which he offered on the subject of the accuracy and decipherability of the notes. He does not point to any rulings because there was no evidence offered on this subject by petitioner. Also, he does not object to the ruling on any particular questions put to the witnesses Fraser and Burdick, who testified as to the accuracy and decipherability of the notes.

Indeed, in the preliminary stages in December, prior to the trial, petitioner's counsel asserted that their expert had found "hundreds" of errors in the transcript (pretrial RT 201-202). However, this witness was not offered on the subject and no ruling as to the admissibility of his testimony was necessary. Perhaps the witness was not offered because if he were able to find "hundreds" of errors, it would indicate that he was able to decipher, and in fact could accurately read, the notes in order to determine the correct transcription from the alleged erroneous one.

Petitioner also attempts to make much of his demand that Fraser, the substitute court reporter, be required to submit to a test in court as to his ability to decipher the notes. The *record establishes* that the District Court offered to put the substitute court reporter in his chambers in order to permit him to work on the transcription of a page of the original notes

(see RT 281-292:21). Petitioner did not avail himself of this offer. Furthermore, the witness read the substance of pp. 70-73 of the notes in court. (RT 368.)

Petitioner raises a false issue in his contention that the District Court precluded him from offering arrest reports and hospital records concerning the substitute court reporter. Such issue is false because no such evidence was offered and no such ruling was necessary. The petitioner sought an order for the production of such records, but did not offer them (RT 912).

Likewise, the contention concerning the refusal of the trial court to permit questions concerning the arrest reports and hospital records is without substance. The hospital records referred to were clearly irrelevant since they were records of the hospitalization of the substitute court reporter in 1953, three years subsequent to the date of the transcription. Likewise the arrest reports are irrelevant since convictions, and not arrest reports, are admissible. Also, these records would not establish that the substitute court reporter was intoxicated while actually working on the transcript. Such inquiry would not necessarily have a bearing on the issue of fraud or collusion or corruption.

Petitioner likewise contends that he was denied an opportunity to adequately prepare for trial. In December, 1954, petitioner filed a *verified* petition swearing that the substitute court reporter, deputy district attorney and the trial judge entered into a fraudulent and corrupt arrangement to procure a fraudulent transcript for the use of the California Supreme

Court. Presumably petitioner was ready and able to prove those very serious charges at that time. The petition contains a statement that "said persons have stated that they are willing to testify to facts germane to this matter under oath pursuant to subpoena" (CT 22).

On November 30, 1955, after a hearing on the question of fraud was ordered by the U.S. Supreme Court, petitioner's counsel demanded the issuance of a writ of habeas corpus. (Pretrial RT 32.) At this same time petitioner's counsel insisted that petitioner was ready and able to proceed to trial immediately. (Pretrial RT 20:8; 32:24.) At petitioner's request the writ was issued returnable December 8, 1955. The trial was set for January 9, and later continued to January 16, 1956. Thus the trial was held well over a month after the return to the writ was filed, when, in fact, the statute contemplates an immediate trial. Sec. 2243, title 28 of the U.S. Code provides that "When the writ or order is returned, a day shall be set for hearing, not more than five days after the return, unless for good cause additional time is allowed." The statute contemplates an immediate trial on the sworn statements of the petition, which would become the traverse to the return. In the light of petitioner's initial insistence that he was ready for trial, the setting of the hearing at a period of a month and a half from the date was more than a liberal allowance by the trial court.

Petitioner also contends that his time to prepare was inadequate due to the facilities at the prison and

the interference with his preparation by the prison authorities. He alleges that the affidavits filed by himself and other persons in the pretrial proceedings concerning the conditions at the prison were unanswered by counter-affidavits. Most of these proceedings were had without notice and due to the shortness of time counter-affidavits were unable to be prepared. (See pretrial RT 120:10.)

It should be noted, however, that on December 21, 1955, Mr. Davis and Miss Asher had elected to use but 12 hours and 25 minutes out of a possible 104 hours available to them under the order of the court. (Pretrial RT 119:13.)

Furthermore, insofar as the prison guards looked at the papers passed between Chessman and his counsel, the Warden testified that the guards did not know the difference between legal papers of one kind or another. They simply looked in order to determine whether the paper was part of a manuscript of a book or a legal document. (See pretrial RT 154:13-17.)

Furthermore, on December 30, 1955, the District Court made the unprecedented offer to counsel that the petitioner might be transferred to the Federal authorities at Alcatraz, and set out in detail the availability of facilities to petitioner for consultation with his counsel and other persons. (See pretrial RT 186:20-189.) This offer was not accepted.

Likewise, the petition for certiorari contains an allegation that the District Judge was biased and prejudiced against him and likewise allegations that Judge Lemmon of the United States Court of Appeals

had a fixed personal opinion. The petition makes many sweeping accusations and quotes the court out of context.

The United States Court of Appeals has fully discussed the question involving the sufficiency of the affidavit of prejudice. Thus respondent will here point out some of petitioner's misstatements in this regard. For example, petitioner states that "a fair sample of Judge Goodman's unusual reaction and attitude . . . is revealed by his comments: . . . 'this should be in the State of California, but until there is some change in the statutes we have to use this laundry to take care of this affair instead of the State of California.' "

To construe this statement as a criticism of petitioner is to stretch the imagination. In fact, such statement is more reasonably interpreted as a criticism of the State of California for refusing to "take care of this matter".

Likewise, petitioner, at page 20 of his petition, quotes the District Court as follows, " 'I don't like to make an order' enforcing petitioner's rights, because it was a state case. . . ." Said statement is grossly misleading and has taken the District Court's statements out of context, and the editing itself is indicative of its misleading character.

In fact, the record clearly establishes that Judge Goodman was very fair and very patient throughout this whole proceeding. He granted petitioner an additional month and a half to prepare prior to the trial, rather than the five days set out in the U.S. Code. Judge Goodman likewise made an unprecedented

offer to petitioner. Although the marshal had no facilities himself in which to take actual custody of petitioner, the court arranged with the federal prison authorities at Alcatraz for petitioner to stay in those facilities pending the completion of the hearing. Likewise, the District Judge ordered the respondent to produce the notes from Los Angeles and deposit them with the Clerk for the Northern District of California. He likewise secured the attendance of five witnesses for the petitioner, including the Superior Court Judge and the substitute court reporter. Judge Goodman was patient and fair throughout the seven-day hearing.

It is submitted that any allegations of bias and prejudice against the District Judge stems only from a personal antipathy toward anyone who does not agree with petitioner.

It is further submitted that these many quibbles which petitioner has with the conduct of the hearing in the District Court have all been completely and fully reviewed by the United States Court of Appeals and that court's determination that petitioner had a full and fair hearing is correct. No important question concerning the conduct of hearing in the District Court is presented for this Court's determination.

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN CONSIDERING ONLY THE QUESTION OF FRAUD AND COLLUSION IN THE PREPARATION OF THE RECORD ON APPEAL; NO CONSTITUTIONAL PROBLEM IS PRESENTED FOR REVIEW BY THIS COURT AS TO THE PROCEDURES USED IN THE CALIFORNIA COURTS TO SETTLE THE RECORD.

The constitutionality of the procedure used in the California courts has been adjudicated as constitutional; the procedures used were proper and in no way violated equal protection of the law. Petitioner again contends that he was denied due process and equal protection of the law by the procedure used to settle the record in the State court. He alleges that in the absence of his physical presence the proceedings were fatally defective. There are at least four answers to these contentions.

A. The District Court could properly refuse to consider any allegations concerning the procedure used to settle the record in the California courts other than the question of fraud and collusion in the preparation of such record.

The District Court could properly rule on the ground that such allegation was repetitious, as well as being without merit. The District Court is not required to entertain a repetitious petition. The question of the validity of the procedure used to settle the record in the State court has been expressly raised many times, in both the State and Federal courts. The question was expressly raised in the case of *People v. Chessman,* 35 Cal.2d 455, and this Court denied certiorari in 340 U.S. 840.

The petition which was originally filed in December, 1954, contained essentially the same allegations as

prior petitions in the Federal courts, and was repetition, and thus properly denied.

The rule which permits a District Judge to deny was set out in *Salinger v. Loisel,* 265 U.S. 224. Congress has codified the principles of *Salinger v. Loisel* into section 2244, Title 28 of the U.S. Code. The District Judge properly exercised his discretion in denying that portion of the petition, since the matter had been determined on a prior application.

The rule which permits denial of repetitious petitions is sound. A court should not be required to repeat its rulings without end.

B. The constitutionality of the procedures used to settle the record has been adjudicated.

The U.S. Court of Appeals, in the case of *Chessman v. Teets,* 221 Fed.2d 276 at 278, expressly determined that Chessman had waived his right to counsel and was precluded from urging the matter. This Court, in 350 U.S. 3, impliedly adjudicated this issue by ordering a hearing solely on the question of fraud and collusion in the settlement of the record. Of course, the United States Supreme Court likewise impliedly approved the procedure used in prior decisions. The question was expressly raised in the case of *People v. Chessman,* 35 Cal.2d 455, this Court denied certiorari (340 U.S. 840).

In that particular case this Court had the opportunity to pass on all phases of the procedure used in the State court to settle the record. In that particular case the constitutional question was clearly presented and was not entangled with any State question.

Policy demands an end to litigation, and we will not assume that the United States Supreme Court intended that after a full hearing to determine the issue of fraud and corruption in the settlement of the record, the issue of the procedure used in the State courts should again be raised in this Court and thus further impede and stifle the State administration of justice.

C. The procedure used by the State court was constitutional; it did not deny petitioner due process or equal protection of the law.

A state is not required under the due process clause to provide an appellate procedure for review of a criminal trial. (See *Brown v. Allen,* 344 U.S. 443, at 486; *McKane v. Durston,* 153 U.S. 684, at 687.)

However, such appellate procedures must not be discriminatory. See *Cochran v. Kansas,* 316 U.S. 255 (prison officials prevented the filing of an appeal); *Dowd v. Cook,* 340 U.S. 206 (prison officials prevented the filing of an appeal); *Cole v. Arkansas,* 333 U.S. 196 (defendant's convictions were affirmed under a criminal statute for violation of which they had not been charged).

The procedure in California for the settlement of a record where a court reporter dies before transcribing his notes was set out in *People v. Chessman,* 35 Cal.2d 455. This *was and is the law of California.* This procedure was reasonable, and in no way discriminatory as to Chessman.

Procedures for the determination of the record in similar cases has been approved by several State

courts. See note 19 A.L.R.2d 1098. Also see *Dowdell v. United States,* 221 U.S. 325.

The procedure used in this particular case is not dissimilar to the common law procedure or the procedure followed by numerous states until very recently in the settlement of bills of exceptions.

The procedure used in the State court to determine the accuracy of the record included the appointment of one of the deceased reporter's former employees to transcribe the notes of the deceased reporter. This reporter was aided by the notes which had been taken by the judge during the trial. A copy was sent to Chessman. He submitted a written "Motion to Augment and Correct Record" in which he requested numerous changes. The trial judge heard the written objections to the record, he allowed some and disallowed others. The reporter certified the record as being full and complete to the best of his ability. The trial judge certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination . . . and the same is now, therefore, approved by me . . ." (see *People v. Chessman,* 35 Cal.2d 455, at 459).

Likewise, Chessman submitted a long list of corrections to the California Supreme Court in the proceedings held before that court. Indeed, we have noted that the District Judge expressly found that there was no fraudulent or unlawful conduct in the preparation of the transcript on appeal by the Deputy District Attorney and no misrepresentation to the trial judge

for the purpose of inducing the trial judge to settle the record. The District Judge likewise found that there was no fraud or collusion between the Deputy District Attorney, the substitute reporter, and the judge in the settlement of the record. Furthermore, the District Court expressly found that Fraser, the substitute court reporter, was especially competent to transcribe Perry's notes and did so, with fairness and competence. Furthermore, the District Court expressly found that Fraser and Leavy and the trial judge "endeavored to and did complete the transcript in the Chessman case in the best of good faith and with diligence and fairness so that a fair and correct record could be presented to the Supreme Court of California . . ." (CT 211-213)..

Furthermore, as is pointed out by the Supreme Court of California in the decision of *People v. Chessman,* 35 Cal.2d 455, at 462, 465, even if all of the inaccuracies and omissions claimed by Chessman were allowed, the subject on appeal would nevertheless not have been affected.

D. Any alleged denial of due process by virtue of the fact that appellant was not present at the settlement of the record in the State court has been waived.

Petitioner asserts that he was denied due process since he was not given the opportunity to defend against the disputed transcript in the State court.

Petitioner's contention has never been that he was deprived of counsel at proceedings to settle the record, but his contention was that he was his own counsel and he must be allowed to be present. If his conten-

tion now is that he was deprived of the right to be represented by counsel at these hearings, he was waived to objection by failing to raise the objection on appeal in the State court. He may not use the writ of habeas corpus as a writ of error.

Furthermore, the California Supreme Court determined the question of petitioner's right to be present as follows:

> "Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before Courts to present legal arguments. Neither reason, public policy, nor any express provision of law require defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendand who is represented by counsel." (*People v. Chessman*, 35 Cal.2d 455, 467.)

This is a reasonable rule of procedure and thus not violative of due process. In fact a like rule applies to federal prisoners who file appeals or other legal

proceedings in federal courts after conviction and confinement.

CONCLUSION.

We respectfully submit that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
March 11, 1957.

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